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Illiberal Libertarians: Why Libertarianism Is Not a Liberal View

Liberalism as a philosophical doctrine can be distinguished from liberalism as a system of social and political institutions. Philosophical liberalism maintains that, first, there is a plurality of intrinsic goods, and that no single way of life can encompass them all. There are then different ways of living worth affirming for their own sake. Second, whatever intrinsic goods are appropriate for individuals, their having the freedom to determine and pursue their *conceptions* of the good is essential to their living a good life. Finally, necessary to individuals' good is that their freely adopted conceptions of the good be consistent with justice. All have an interest in exercising their freedom so as to respect others' basic rights and other requirements of justice. While this does not mean that justice is necessarily an intrinsic good (although it can be), it does mean that observing justice's demands is a normal precondition of living a good life.

Kant, Mill, Rawls, Berlin, Dworkin, Raz, Nagel, Ackerman, Barry, and many others endorse some version of these claims. Philosophical liberalism is but one way to argue for liberal institutions, including a

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liberal constitution. Utilitarianism and other forms of welfarism historically have provided an alternative foundation for liberal institutions.[1] Utilitarianism is philosophically non-liberal: since it affirms one ultimate good—overall utility or welfare—as the source of all value, it rejects the plurality of intrinsic goods and subordinates to utility the goods of freedom and the virtue of justice.

My focus is not philosophical liberalism but liberal institutions and the primary features of a liberal constitution. My aim is to situate on the map of political conceptions three contemporary views, each of which is called 'liberal': (1) classical liberalism, (2) what I will call 'high liberalism,' and (3) libertarianism. Major proponents of classical liberalism include David Hume, Adam Smith and the classical economists (most of whom were utilitarians), and contemporary theorists such as David Gauthier, James Buchanan, and Friedrich Hayek. I use the term '*classical liberalism*' in the Continental sense to refer to a liberalism that endorses the doctrine of laissez-faire and accepts the justice of (efficient) market distributions, but that allows for redistribution to preserve the institutions of market society. By '*high liberalism*' I mean the set of institutions and ideas associated with philosophical liberalism, which I take to be the high liberal tradition.[2] Its major philosophical advocates in each century from the eighteenth to the present are Kant, Mill, and Rawls. Locke, the original liberal in many regards, appears to accept philosophical liberalism as defined and thus also might be classified as a high liberal. But because of his account of property,

1. Mill says he is a utilitarian, but he understands that doctrine differently than classical or contemporary utilitarians. For Mill "individuality" and the exercise and development of higher capacities, including a sense of justice, form the larger part of individual well-being (see *Utilitarianism*, chap. 2, and *On Liberty*, in *On Liberty and Other Essays*, edited by John Gray [Oxford: Oxford University Press, 1991], chap. 3). See also Rawls's suggestion that Mill endorses a "liberalism of freedom" rather than a "liberalism of happiness" that is based in utilitarianism or welfarism. John Rawls, *Lectures in Moral Philosophy* (Cambridge: Harvard University Press, 2000), pp. 330, 343, 366.

2. Some may object that "high liberalism" is tendentious, but the term no more implies moral superiority to classical liberalism than "High Renaissance" implies that Raphael's art is superior to Botticelli's. To call it "welfare liberalism" wrongly suggests that classical liberals do not support public assistance for the poor (see below); it also puts the emphasis in the wrong place (especially given Rawls's denial that he is arguing for the welfare state). See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, revised edition 1999), pp. xiv–xvi, in Preface for Revised Edition.

he is often read as a classical liberal.[3] Locke's account of property has had a major influence on libertarianism too. By '*libertarianism*' I primarily mean the doctrine argued for by Robert Nozick, and also in differing accounts by Jan Narveson, Ayn Rand, Murray Rothbard, John Hospers, Eric Mack, and others. These and other libertarians have particular differences, but there are certain basic principles and institutions that they all endorse (see sections II and III below).

It is commonly held that libertarianism is a liberal view.[4] Also, many who affirm classical liberalism call themselves libertarians and vice versa. I argue that libertarianism's resemblance to liberalism is superficial; in the end, libertarians reject essential liberal institutions. Correctly understood, libertarianism resembles a view that liberalism historically defined itself against, the doctrine of private political power that underlies feudalism. Like feudalism, libertarianism conceives of justified political power as based in a network of private contracts. It rejects the idea, essential to liberalism, that political power is a public power, to be be impartially exercised for the common good.

To appreciate these claims requires some stage-setting. I begin with a discussion of primary liberal institutions. Section II turns to libertarianism and discusses its interpretation of liberty as a kind of property. Then, in section III, I explain how libertarians' conception of liberty as a kind of property leads them to reject basic liberal institutions.[5]

3. Locke's writings allow him to be interpreted either way. Because Locke antedated classical price theory and the classical economists' emphasis on the efficiency of free markets, and did not foresee the conditions of a modern market economy, the dispute whether Locke is a classical or high liberal may have no definite answer. For instructive accounts of Locke on property and economic justice, see A. John Simmons, *The Lockean Theory of Rights* (Princeton, N.J.: Princeton University Press, 1992), chaps. 5 and 6; Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988), chap. 6; and James Tully, *A Discourse on Property* (Cambridge: Cambridge University Press, 1980).

4. Jeffrey Paul, for example, refers to Nozick's libertarianism as the "recent successor of Lockean liberalism." *Reading Nozick*, edited by J. Paul (Totowa, N.J.: Rowman and Littlefield, 1981), p. 4. T. M. Scanlon says Nozick's book is "liberal in the nineteenth century sense of the term." "Nozick on Rights, Liberty, and Property," in *Reading Nozick*, p. 107. Nozick himself claims he relies on a "classical liberal notion of self-ownership" (*Anarchy, State, and Utopia* [New York: Basic Books, 1974], p. 172 [*ASU* in further citations]).

5. My purpose is not to establish "bragging rights" to the honorific term 'liberal', but rather to point to a fundamental difference in principles and institutions and to locate

Institutional Features of a Liberal Constitution

Equal Rights to Basic Liberties

The most characteristic feature of a liberal society is its toleration of beliefs and diverse ways of life. Dissent, nonconformity, and an assured space of independence are accepted as normal in social life. Toleration is institutionalized by the political recognition that certain liberties are more important than others. These basic liberties are designed to maintain, through the rule of law, the security and integrity of persons and their freedom to live as they choose, within prescribed limits. Basic liberties apply to all persons equally (or at least all citizens) without regard to social or economic status. The equality of basic liberties is the primary way that equality is recognized in liberal institutions.

Liberal philosophers offer different lists of basic liberties, but for all of them liberty of conscience is centrally important. Liberty of conscience includes freedom of religious beliefs, which was critical to liberalism's origins in the seventeenth century.[6] It has in modern times come to include freedom to form philosophical views and ethical convictions about questions of ultimate value and life's meaning. Liberty of conscience is perhaps the most important liberal basic liberty since it secures toleration of religious, ethical, and philosophical beliefs and allows for pluralism of conceptions of the good. But other liberties have come to be regarded as of equal political significance. The list of liberties that Mill maintains as part of his Principle of Liberty are liberty of conscience; freedom of thought and discussion (including free-

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the principles that libertarians really endorse that lead to this difference. If anyone wants to continue calling libertarianism a "liberal" conception, this is fine so long as its differences with other liberal views are understood as significant. But to categorize libertarianism as a form of liberalism obscures what is really distinctive about both views.

6. After nearly two centuries of religious strife and civil war, enlightened opinion gradually began to accept that a religious confession was no longer capable of providing a basis for political unity and allegiance. It was seen that inevitably people will have conflicting religious views, and that for governments to try to enforce one faith is a recipe for perpetual strife. On the origin of liberalism in the wars of religion, see John Rawls's introduction to his *Political Liberalism* (New York: Columbia University Press, 1993, paperback ed. 1996), pp. xxiv–vi; see also John Gray, *Two Faces of Liberalism* (Oxford: Blackwells, 2000), chap. 1.

dom of speech, press, and opinion, and inquiry into all subjects); "freedom of tastes and pursuits," or the freedom to pursue a "plan of life" to suit one's character; and freedom of association.[7] Rawls's list of basic liberties is similar.[8] In addition to liberty of conscience, freedom of thought, and freedom of association, Rawls includes equal political liberties (including the right to vote and hold office, freedom of assembly, and the right to organize and join political parties), the rights and liberties needed to maintain the freedom and physical and psychological integrity of the person (including freedom of occupation and of movement, and the right to hold personal property)[9]; and the rights and liberties needed to maintain the rule of law.[10]

In holding these rights *basic*, liberals mean that they are both fundamental and inalienable. To say certain rights or liberties are *fundamental* means they have absolute priority over other political values; they cannot be sacrificed or weighed off against non-basic rights or other political values in ordinary political procedures. The basic liberties of citizens, then, are to be infringed upon neither for the sake of satisfying the preferences of democratic majorities, nor to improve economic efficiency, nor to achieve perfectionist values of cultural excellence. Liberal doctrine standardly holds that limits on the exercise of basic liberties are to be imposed only to protect and maintain others' basic liberties and the rights and duties of justice needed to sustain them.[11]

7. See Mill, *On Liberty*, chap. 1, pp. 16–17, near the end of the chapter.

8. See Rawls, *Political Liberalism*, lecture 8, p. 291, for Rawls's list of basic liberties, which elaborates the initial definition of basic liberties given in *A Theory of Justice* (Cambridge: Harvard University Press, 1971, revised edition 1999), p. 61/53 rev. Henceforth page references to the first and second editions are indicated as follows: '79/66.'

9. See Rawls, *Political Liberalism*, p. 335, where Rawls says that denial of freedom of movement and occupation violate the liberty and integrity of the person. In *A Theory of Justice*, p. 61/53, and *Political Liberalism*, p. 298, Rawls says that the right to hold personal property is part of freedom of the person.

10. The rule of law involves several requirements, including similar cases treated similarly, no offense without a law, public promulgation of laws, no ex post facto laws, fair and open trials, rules of evidence insuring rational inquiry, and a number of other rights associated with the idea of due process. See Rawls, *Theory of Justice*, sec. 38.

11. For example, a person's freedom of speech can be limited if it causes imminent violence or fear thereof (e.g., threats, conspiracies, or inciting to riot), or deceptions regarding property (prohibitions against fraud or false advertising), or unjustifiable injury to personal integrity (restrictions against private libel, or breach of privacy). These are examples of what Rawls means by "liberty can be limited only for the sake of liberty." See Rawls, *Theory of Justice*, sec. 39, and *Political Liberalism*, chap. 8.

More important for our purposes, the idea of basic liberties also includes their *inalienability*: a person cannot contractually transfer basic liberties or give them up voluntarily. No liberal government would enforce a contract or agreement in which one or more persons tried to sell themselves into slavery or indentured servitude, or agreed to give up liberty of conscience and freedom of association by making themselves permanent members of some religious sect. Because people cannot voluntarily transfer basic liberties, such liberties are not like property rights in particular things.[12] People might involuntarily forfeit certain liberties upon committing a crime that violates others' rights, but involuntary forfeiture is not the same as voluntary alienation.[13]

Different arguments have been made for inalienability.[14] One argument stemming from Kant is that the inalienability restriction is needed to maintain the status of persons as beings with dignity. For Kant, our humanity consists in our capacities for freedom and reason. Having these capacities, persons have dignity, a kind of value "beyond all price." Having dignity, persons are due respect whatever their status or situation. Equal basic rights secure (because they partly constitute)

12. Some legal scholars argue that exclusive employment contracts are on a par with slavery and indentured servitude, differing only in degree. But this misconceives the nature of exclusive employment contracts. They do not involve the alienation of freedom of occupation and control over one's person. At any time a person may quit and take up another career (although usually not the same career for the period covered by exclusive services contract). For example, a professional athlete can retire and take up another line of work, but cannot compete in the same sport for another team during the term of his contract.

13. A prisoner obviously surrenders some of his basic liberties—freedom of association, freedom to pursue his good, freedom of movement, and normally the right to vote, but not liberty of conscience or all freedom of thought and expression.

14. See Mill, *On Liberty*, chap. V, pp. 113–15; Rousseau, *Social Contract*, book I, chap. 4, "On Slavery," in Rousseau, *The Basic Political Writings*, translated by David A. Cress (Indianapolis: Hackett, 1987), pp. 144–47. In *The Metaphysical Elements of Justice*, translated by John Ladd (New York: Library of Liberal Arts, 1965), p. 98 (Ak VI:330), Kant says: "No one can bind himself by a contract to the kind of dependency through which he ceases to be a person, for he can make a contract only insofar as he is a person." In "On the Proverb: That May Be True in Theory but Is of No Practical Use" (Ak VIII:293, quoted in *Perpetual Peace and Other Essays*, translated by Ted Humphrey [Indianapolis: Hackett, 1983], p. 75) where Kant says that no person can lose his equality as a person except through transgression; equality cannot be alienated "through a contract . . . for there is no act (neither his own nor that of another) that conforms with right whereby he can terminate his possession of himself and enter into the class of domestic animals."

equal respect for persons as beings with dignity. Since basic rights secure equal respect, they are without a moral exchange value; agents cannot bargain their rights and humanity away. To attempt to freely alienate one's capacity for freedom is morally void since it disrepects one's own humanity. By securing the status of each as an equal due respect, inalienability maintains the dignity of persons.

Some criticize the Kantian argument for inalienability for its "paternalism," defined as a restriction of the self-regarding free choices and agreements of competent and consenting adults to protect interests they may not endorse. Critics contend that respect for persons implies respect for their voluntary informed choices, even if their choices are not rational. If maintaining one's own dignity and capacities for freedom are not important enough to a person, why should that person be restricted from voluntarily entering binding agreements that limit freedom to further "individuality" or felt interests?[15] This objection raises the controversial issue, about which liberals differ, as to why people should enjoy basic rights and liberties to begin with: Is it because of persons' capacities for reason and freedom (as Kantians claim), or because of their capacities for happiness or desire (as liberal utilitarians may say), or because all are created equals by God (as Locke and natural law theorists contend), or because of another reason (e.g., everyone's having a capacity for self-realization or perfectibility)?

The liberal argument for inalienability can avoid this source of contention. For the issue of inalienability comes down to a question of the design of basic legal institutions, in particular the institutions of property and the use of government power to enforce personal agreements.[16] Nothing about liberalism's inalienability restriction prevents people from voluntarily assuming the roles of master and subordinate to nearly any degree they choose. If this is the kind of life a person wants to live in relationship with another who consents, so be it; it is protected by freedom of association. The inalienability restriction im-

15. See Joel Feinberg, *Harm to Self* (Oxford: Oxford University Press, 1986), pp. 94–97.

16. The argument that follows in the text assumes that one does not have to be a Kantian to recognize the following: duties of mutual respect and mutual aid; that inflicting harm upon others against their will and for one's own personal benefit is wrong; that slavery is wrong since it involves treating others as things; and that failure to respect others as persons with rights is wrong. Utilitarian and natural law theories can accept all of these as legitimate reasons.

plies that a person has the right to exit at any time this essentially private relationship.[17] The problem comes with the contrary suggestion: that into this private relationship should be introduced the legal mechanism of contract and the institution of private property, with their provisions for coercive enforceability. Then the voluntary servitude arrangement is no longer merely a matter "between consenting adults"; it becomes a matter of civic law and a publicly recognized right. One party to the arrangement enters the public and political realms to demand, as a right, that others recognize and respect a private agreement bestowing ownership in another person. Society is called upon to adopt publicly a parallel attitude and to treat a person, not as a being with rights due moral consideration and respect, but as property, an owned thing. Alienation of basic rights, if politically recognized, imposes duties not just upon the transferor, but also upon society and its members to respect and uphold such transactions. We are called upon to ignore the moral fate and political status of others as equals, and to participate in their civic and moral debasement. Moral and legal duties of mutual respect, protection from unwanted harm, and mutual assistance of others in distress are suspended, and society's members are obligated to apply their collective force to compel another's "property" to comply with contractual obligations.[18] By embracing alienation agreements as matters of enforceable public right, we accept a mandate to coerce and harm certain people against their will, and to regard and respond to them as if they were things. Moreover, in recognizing and enforcing these contracts, government and its agents are treating people accordingly.

17. Brian Barry emphasizes that a right of exit is essential to freedom of association. See his *Culture and Equality* (Cambridge: Harvard University Press, 2001), pp. 148–62.

18. To illustrate this problem, suppose slave contracts are accepted as legally and morally binding. I agree to grant refuge to an abused runaway who is contractually bound to slavery due to youthful exuberance, indiscretion, or desperation. Am I under a legal and moral duty to turn her in? Wouldn't I be guilty of more than one crime if I did not: not simply aiding and abetting, but also crimes of property such as conversion and receiving stolen goods? How can I fulfill my legal and moral duties in this society without harming this person, and treating her according to rules appropriate for things? The example can be developed in other disturbing directions. Suppose the slave's owner is a pimp. Does this mean forcing the slave to engage in involuntary intercourse is not rape so long as her/his owner consents? Or, if it is still rape, do "johns" nonetheless have a right to rape with the owner's permission? Whatever the case, if slavery agreements are permissible we have to assume it would be wrong, morally as well as legally, for third parties to interfere to prevent coerced sex.

Liberalism holds that consenting adults do not have the rights or powers to impose such extraordinary duties upon others as a result of their private agreements. Beneficiaries of servitude pacts and other bargains alienating basic rights cannot ask government to recognize and enforce them. It may be in an agent's interests at the time to alienate her basic rights; nonetheless, the private demand to publicly recognize this agreement as a binding contractual relationship conflicts with others' moral duties and interests (as liberals perceive them). Moreover, it conflicts with the public interest in maintaining the status of persons as free and equal, and the moral quality of civic relations. Liberals refuse to use public laws to treat people as objects without rights, even if people want to be treated this way. There is no place within the liberal conceptual order for the political or legal recognition of people as property or as anything less than persons with basic rights.[19]

So it is because contract and property are matters of publicly enforceable right imposing uniform duties upon everyone that liberals do not respect the outcome of just any given private agreement as a valid enforceable contract. This is related to the omission of rights of property and freedom of contract from the lists of liberal basic rights and liberties mentioned earlier. Some may see this omission as glaring. Locke, after all, is commonly said to have argued for a "natural right of

19. The public recognition of all as civic equals and as free is crucial here. This means that the liberal case for inalienability does not depend simply on the idea that liberal government and its citizens are not to be made complicit in the enforcement of servitude contracts. Suppose the defender of servitude contracts were to say: "Okay, so do not exercise the coercive powers of the state to enforce servitude contracts. All we ask is that beneficiaries have immunity from criminal laws when they seek self-enforcement (perhaps with the help of their henchmen). No one else need dirty their hands." The liberal position is that servitude contracts are absolutely void, not deserving any legal recognition. The fact that the beneficiary of an involuntary servitude contract seeks to coercively enforce the contract himself is reason enough for government to intervene. (After all, it is a violent assault on a person.) As explained below, liberals see the exercise of coercive power ultimately as a public power. Individuals are authorized in certain instances to use coercive power (most commonly in self-defense), but then it may not be exercised excessively, or to undermine the public good. Central to the liberal public good is maintaining the civic status of persons as free and as equals. Basic rights are the primary means for securing this status. As citizens have a duty to respect one anothers' basic rights (even when some are willing to abandon them), governments have a duty to protect these rights and maintain conditions appropriate for their exercise. For this reason a government cannot sit idly by while one person seeks self-enforcement of a servitude contract.

property."[20] To many his argument seems to place rights of property on a par with basic rights. But whatever Locke intended by his account of property in a state of nature, neither he nor any other major liberal philosopher argue that governments have no authority to regulate property and contractual agreements, and burden them when necessary for the public good.[21]

Here the formal right to own property needs to be distinguished from the right to particular properties, for instance, my right to my homestead. Like the right to enter binding contracts, the formal right of ownership—the capacity to have rights in things as they are defined by law, and to have this capacity equally with other citizens—is arguably basic for liberals. (Or, if not basic in the defined sense, rights to property and to contract are necessary enabling rights since they are a precondition to the effective exercise of most basic liberties.) To be incapable of ownership and contracts, as these rights and powers are defined by law, is one of the marks of dependence and / or servitude (as with married women and children in common law). But the formal capacity of ownership implies little about the content of one's rights, or the kinds of rights in things people ought to be allowed to have in any particular property system.

Liberals of the classical and high traditions can agree that legal capacities for ownership and contract are basic rights (or at least are essential to exercising basic rights). Having exclusive control over some personal property and a protected domicile are conditions of individual independence. But this does not mean that rights to particular things are themselves basic (or fundamental) rights.[22] On any liberal conception, government can regulate and proscribe uses of property (e.g., my use of my homestead for commercial purposes), and even appropriate property by eminent domain procedures if necessary for the public good (so long as fair compensation is made). This intro-

20. This is not a term Locke used; indeed, he rarely referred to "natural rights" at all. Cf. his reference to "that *equal Right* that every man hath, *to his natural Freedom*" (*Second Treatise*, paragraph 54, in John Locke, *Two Treatises of Government*, edited by Peter Laslett [Cambridge: Cambridge University Press, 1960], p. 304).

21. See Locke's *Second Treatise*, par. 73, 120, 138, 139, for clear indications that government has the authority to regulate property, tax it, and burden it for the public good.

22. Of course, they could not be basic in the defined sense implying inalienability, if particular property rights are to retain their status as freely transferable.

duces an element of historical contingency into property: Rights of property, as legally specified, must be revisable by law to meet changing conditions for the sake of efficiency, public safety or convenience, or some other social value. Rights of property are not in these regards fundamental: They can be regulated and revised for reasons other than protecting and maintaining basic rights and liberties.

One characteristic mark of libertarianism is the contrary claim that rights of property are both plenary and fundamental (as defined above): A person's rights to use and transfer particular possessions (e.g., an automobile or income) cannot be infringed or burdened for the sake of other social values. Instead one's use of property can only be restricted to protect others' (moral) rights. I shall call this conception of property "absolute."[23] Absolute property is perhaps *the* most significant right in a libertarian view (as discussed in section II).

Equality of Opportunity

A second feature of a liberal constitution is the absence of political restrictions on entry into social and political positions. Positions are to be held open to everyone regardless of their racial, ethnic, or gender group, religious or philosophical views, or social or economic position. Equal opportunity developed out of the rejection of the idea that people are assigned social positions by birth, and cannot legally move out of their class into another. As Kant said, "Every member of the commonwealth must be permitted to attain any degree of status . . . to which his talent, his industry, and his luck may bring him; and his fellow subjects may not block his way by [appealing to] hereditary prerogatives."[24] The requirement of open positions is part of equality of

23. The term "absolute property" derives from J. S. Mill's *Principles of Political Economy*, "Of Property," book III, chap. i, section 3. Mill distinguishes absolute from "qualified property." Absolute property does not imply no restrictions whatsoever on property. For Nozick, "The central core of the notion of a property right in X . . . is the right to determine what shall be done with X," but one's options are constrained. "My property rights in my knife allow me to leave it where I will, but not in your chest" (Nozick, *ASU*, p. 171). "Constrained options" designed to protect others' rights are compatible with absolute property.

24. Kant, "On the Proverb: That May Be True in Theory But Is of No Practical Use," p. 74.

opportunity. This is another way that liberals incorporate equality, in addition to equality of basic rights.

Liberals interpret equality of opportunity differently. At a minimum, it is formally construed as an absence of legal or conventionally imposed restrictions that bar socially disfavored groups access to social positions. Discrimination in allocating positions that are based on race, gender, and other natural or social attributes unrelated to job performance would then be legally prohibitable. The underlying idea is that careers should be "open to talents" (as Adam Smith said) or to "merit" (as others say), that is, positions should be accessible to all who are willing to compete for them and who are able to satisfy performance demands. The "system of natural liberty" affirmed by classical liberals incorporates this formal conception of equal opportunity.[25] This reading fits well with classical liberals' emphasis on economic efficiency.

Other liberals contend that merely eliminating restrictions on entry to positions does not take equal opportunity seriously enough. The sense in which positions are open to the poor is nominal if not illusory under the formal conception, since the poor have no real opportunity (far less an equal or fair one) to compete for favorable positions without educational benefits. Society then has a duty to support an education system to even out class barriers so those with similar abilities can compete on an equal footing. Others argue that fairness requires still more, namely, both adequate universal health care so that all may realize their capacities, and preventing excessive accumulations of property and wealth.[26] These fuller conceptions of equality of opportunity are characteristic of the high liberal tradition, and mark one major difference with classical liberalism.

It is sometimes said that equal opportunity can never be achieved, and that the idea is illusory.[27] But within liberalism, equal opportunity

25. The phrase "system of natural liberty" derives from Adam Smith's *The Wealth of Nations* (New York: Random House Modern Library, 1937), book IV, chap. ix, p. 651. David Gauthier approvingly quotes the relevant passage in *Morals by Agreement* (Oxford: Oxford University Press, 1986), p. 83.

26. See Rawls's account of "fair equality of opportunity" (*Theory of Justice*, pp. 73f./63f., section 14, also section 46; and *Political Liberalism*, pp. 184, 284, 363f). On the relevance of adequate health care to Rawls's principle of fair equality of opportunity, see Norman Daniels, *Just Health Care* (Cambridge: Cambridge University Press, 1987).

27. Nozick makes this argument in *ASU*, pp. 235–39.

has never been interpreted to imply equal likelihood of success, an impossible aim under any system. Nor is it seen as value with absolute priority. In liberal thought, equal opportunity presupposes the priority of certain basic rights and liberties. We could perhaps better equalize peoples' chances if the family were radically altered or abolished, but that would infringe upon freedom of association. Liberal equal opportunity means that society should eliminate legal barriers and mitigate the effects of chance in allocating positions, consistent with freedom of association, freedom of occupation, and other basic liberties. Moreover, many liberals argue for some degree of preferential treatment for disadvantaged minority classes, at least temporarily, to alleviate the current effects of past injustices.

Markets, Allocative Efficiency and the Social Minimum

A third feature of liberalism is the significant role assigned to markets in economic relations. Liberals emphasize markets for different reasons, and this marks yet another difference between the classical and high liberal traditions. For such high liberals as Mill and Rawls, markets are primarily seen as a condition of freedom of occupation and association, and achieving fair equal opportunity. Markets are also important for liberals generally since they normally provide for the effective allocation of productive resources, and so better promote the efficient production of goods than non-market schemes. Markets then have an important function in the *allocation* of productive resources.

The allocative role of markets is a basic precept in all liberal views. But it does not commit liberalism to using markets as the exclusive mechanism for *distribution* of income and wealth. The idea that people have a vested right to whatever income and wealth they can acquire by market exchange is rejected, at least by members of the high liberal tradition. A basic tenet of high liberalism is that all citizens, as a matter of right and justice, are to have an adequate share of material means so that they are suitably *independent*, capable of governing and controlling their lives and taking advantage of their basic liberties and fair opportunities. Without sufficient income and wealth, one's liberties and opportunities are worth little. For the destitute particularly, basic rights of free expression and the political liberties are virtually useless. To ensure that everyone's liberties and opportunities are of

significant value, the high liberal tradition envisions nonmarket transfers of income and wealth of some degree, to be arranged by political institutions.[28]

Classical liberals by contrast do not envision a nonmarket mechanism that ensures each person a *right* to income and wealth adequate to individual independence. This does not mean that classical liberals do not provide for a social minimum too; they normally do, but it is not recognized as a requirement of *justice* and what each person is entitled to. Instead, the social minimum is conceived as a matter of public charity so that people will not starve (Friedman), or it is depicted as an expedient required by some other political value, such as (in Hayek) the need to prevent social strife.[29] Characteristic of classical liberalism is the idea that market distributions realized under competitive conditions, or distributions that would be realized under perfect competition, are to provide the basic standard for just distributions. Since real markets are imperfect, government has a role in regulating markets and even redistributing income and wealth if needed to correct for market imperfections. Because classical liberals put great emphasis on market efficiency as providing the standard for just distribu-

28. This may be true of Locke even in his day. See Locke, *First Treatise*, paragraph 42, in *Two Treatises of Government*, p. 170, where he says God "has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods, so that it cannot justly be denied him, when his pressing Wants call for it." For Kant, see *Metaphysics of Justice*, Ak VI:326 in (Ladd trans., p. 93): By "the General Will of the people . . . government is authorized to require the wealthy to provide the means of sustenance to those who are unable to provide the most necessary needs of nature for themselves." For a discussion of the Locke quotation and his views on justice and the duty of charity, see A. John Simmons, *The Lockean Theory of Rights*, pp. 327–36.

29. Friedrich Hayek, *The Constitution of Liberty*, pp. 285–86, makes the Hobbesian argument that "poor relief" is instrumental to preventing widespread theft and disorder. Hayek endorses society's "duty of preventing destitution and providing a minimum level of welfare," but rejects the "welfare state" since it aims at "egalitarian distribution" (p. 289). Hayek also endorses social insurance measures such as compulsory payment for health insurance and old age pensions (p. 298). See also Hayek, *The Mirage of Social Justice*, (Chicago: University of Chicago Press, 1976), p. 87, on society's interest or duty to provide "an assured minimum income, or a floor below which nobody need to descend." Milton Friedman seems to advocate a public charity position based in beneficence; he states a need to "assure a safety net for every person in the country, so that no one need suffer dire distress." See Milton Friedman and Rose Friedman, *Free to Choose* (New York: Avon Books, 1979), p. 110; see pp. 110–17 on the negative income tax as the way to provide this "safety net."

tion, they also assign greater weight to rights of private property and freedom of contract.

By contrast, such high liberals as Mill, Rawls, and Dworkin maintain that property rights should be decided by asking which system of property laws best enables citizens to realize their freedom and independence by effectively exercising their basic rights and liberties and by taking advantage of equal opportunities. Here markets have an important but by no means exclusive role in determining just distributions. Moreover there is no a priori assumption that mandates private property in the means of production. Liberal socialism, allowing for public ownership combined with market allocations of productive resources, is theoretically possible, and if feasible may be called for under certain historical conditions if needed to enable everyone to effectively exercise equal basic liberties.[30] The question whether markets have a preponderate or subordinate role in defining and achieving distributive justice marks the major division within the liberal tradition.

Public Goods

Classical and high liberals alike envision a prominent role for government in the provision of (economic) public goods.[31] Markets break down with respect to the provision of certain goods (because of their "indivisibility"), and all liberals accept that one of government's primary roles is to exercise its powers of regulation and taxation to provide public goods (or at least to ensure their provision through private means.) The provision of public goods is one standard argument liberals give for political authority and the need for government. Even when everyone respects others' rights and obeys the laws, there is still a need for political authority to coordinate peoples' activities so that public goods are provided. This argument goes back to Hume, and is given prominence by Adam Smith.[32]

30. See Rawls, *Theory of Justice*, pp. 270–74/239–42, 280–82/247–49, on the compatibility of the Difference Principle with both liberal socialism and a "property-owning democracy."

31. Commonly mentioned among public goods are national defense, public health and sanitation, police and fire protection, highways, street lighting, ports and canals, water and sewer works, education, and so on, none of which are adequately provided for by markets. For a discussion of public goods, see Rawls, *Theory of Justice*, sec. 42.

32. Smith, *Wealth of Nations*, book IV, chap. ix, p. 651; book V, chap. I, pt. 3, p. 681ff.

Classical liberalism is associated with the doctrine of laissez-faire. But it is important to see just what laissez-faire meant to the classical economists of the Scottish or English schools who advocated it. It did not mean rejection of government's redistributive powers and acceptance of the "night-watchman state."[33] The role of government in providing public goods and even in alleviating economic distress was affirmed by Smith and other classical economists.[34] Instead, laissez-faire implied an absence of government intervention on the side of allocation of productive factors, and non-interference with markets except to maintain their fluidity. Something quite different (we will see) is involved in libertarian views.

The Public Nature of Law and Political Authority

The final primary feature of a liberal system is not expressed by any single institution but characterizes liberal political institutions generally—the principle that political power is a public power, to impartially issue and enforce uniform public rules that apply to everyone and that promote the common good. Political power is sometimes characterized as a monopoly on coercive force held by those who claim (unjustifiably, libertarians say) the authority to rule.[35] But liberalism conceives of legitimate political power differently. Society is possible only if people observe common rules, and for rules to be effective, they must be public and generally accepted. It may be that coercive sanctions are needed to enforce these rules (then again, they may not

33. On this, see John Gray, *Liberalism* (Milton Keynes: Open University Press, 1986), p. 27; and Stephen Holmes, *Passions and Constraints* (Chicago: University of Chicago Press, 1995), chap. 1. Also Friedrich Hayek, *The Political Order of a Free People* (Chicago: University of Chicago Press, 1979), pp. 55 and 187, n. 13.

34. See note 32 for Smith on "public works." On Smith's concern for the poor, see Holmes, idem. It is noteworthy that Smith takes the English Poor Laws for granted, and does not object to public charity (*Wealth of Nations*, p. 135ff.). He objects rather to the "settlement" requirement (that to be eligible for poor relief, it must be publicly known that one is a resident for at least forty days), since it discourages the "free circulation of labor," and freedom of movement and freedom to choose one's place of residence ("an evident violation of natural liberty and justice," ibid., p. 141).

35. Even for Nozick, where the minimal state legitimately acquires a natural monopoly on political power, it has no right to claim political authority or the authority of monopoly rule (*ASU*, p. 108).

be)[36]; but a monopoly on coercion is not what is most distinctive about a political system. What is essential is that necessary public rules be issued and uniformly applied by a commonly recognized authority. Political power is seen by liberals as a *public power.* This means: (1) Political power is *institutional* and not personal; it is ultimately held, not by a specific individual, but by an artificial person, that is, a publicly recognized institution (the government, and finally by the "Body Politic" according to Locke, Kant, and the liberal social contract tradition). (2) Political power is *continuous*; the public institution vested with political power appoints individuals to occupy offices of authority periodically, and survives their demise. Certain commonly accepted rules of succession are needed to specify the steps for transferring power.[37] (3) Political power is held in trust, as a *fiduciary* power; those who occupy political offices act in a representative capacity, for others' benefit. Since it is held in trust, political power is not to be exercised for the benefit of the person who occupies political office. So far as political power is contractual, then, it is not based in a mutually beneficial bargain between ruler and ruled. Here a distinction is to be drawn between a *social contract* versus a mutually beneficial *contract of government* between ruler and ruled. It is the former idea, not the latter, that plays such an important role in the history of liberal thought, providing an account of legitimate political power. The social contract is conceived as a (hypothetical) agreement among equals, by everyone with everyone else. Its purpose is to form political society (the Body Politic), then to establish a constitution and create on its basis a government that serves as *agent* for the People. This is very

36. See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), chap. 10, who argues against the position that coercive sanctions are a precondition for law and a legal system.

37. Continuity of rule does not mean that the form of government or political constitution itself is necessarily permanent. Locke for example envisions the possibility that the Body Politic might "set Limits to the Duration" of a form of government; still he indicates that the Body Politic itself, as a legal body, is permanent (*Second Treatise*, par. 243). Here I take Locke to envision the permissibility of periodic constitutional conventions, where the form of government is reconsidered by the People. Thomas Jefferson went further and argued for a need for periodic constitutional conventions, so that the Body Politic could reconsider and recommit itself to the Constitution with each successive generation of its members. Thanks to an anonymous reviewer for this journal for drawing my attention to Locke's position.

different from a private contract between (unequal) parties for mutual benefit, which is the economic model used for contracts of government. (4) As a fiduciary, government has political power *delegated* to it by the Body Politic; as the People's agent government is to exercise power solely for the benefit of those represented. But since political power is public, it is to represent everyone, and therefore is to be *impartially* exercised and only for the *common good.* (5) Since government is to rule in a fiduciary capacity and solely for the common good, those who hold political power are recognized as having *authority* to rule, and their legal actions are conceived as possessing *legitimacy.* Its political legitimacy in turn supplies government with its basis for demanding allegiance and obedience to its laws.

This account accords with Locke's definition of political power as "the right of making laws . . . only for the Publick Good" (*Second Treatise,* par. 3, see also par. 171). For Locke the relevant contrast was the doctrine of divine right as argued for by Robert Filmer in support of absolute monarchy. According to this doctrine, political power is privately owned by particular persons or families, and extends over a territory and all people within it. Political power is exercised according to its owner's will, without impediments or regulation by any worldly authority.[38] The liberal idea of the rule of law evolved to reject this claim that anyone's conduct can be beyond legal restriction. The rule of law, representative assemblies (elected and non-elected), separation of powers, and the convention that government acts solely as representative of the people, are all institutional expressions of the public nature of political power. Democracy, or a universal franchise with equal rights of political participation, is a natural extension of this idea; for if what affects all concerns all, and assuming that adults are normally best situated to understand and advance their own interests, then it is natural to conclude that each person ought to have a share of political authority to better ensure that no one's basic rights are undermined or interests are neglected in political procedures. Characteristic of contemporary liberalism then is a further feature of the public nature of political power, namely (6) the requirement of *open democratic rule.*

38. The doctrine of divine right contemplated that the Crown was responsible to God in exercising private power. Still, the Crown was beholden to no one on earth. Political power remained unlimited de facto and by positive law, if not by moral right.

The combination of liberalism and democratic government is a nineteenth-century accomplishment. It is not found in Locke or Kant, or in the classical liberalism of Hume, Smith, or Constant; Bentham and the classical utilitarians only gradually came to accept it.[39]

I have discussed six institutional features of liberal political systems: the public recognition and legal enforcement of basic rights and liberties equally provided for all citizens; some account of equality of opportunity with open careers and positions; a central role assigned to efficient markets in allocating productive resources; government's role in the provision of public goods; government's duty to provide a social minimum; and the public nature of political authority. Assuming that these institutions are characteristic of liberal society, liberalism has to be distinguished from a view with which it is often confused.

Libertarianism's Formative Principles

Libertarianism is commonly referred to as a liberal view. This is understandable. After all, libertarians endorse individual rights, individual freedom, and the liberal idea that people ought to be free to determine their conduct and lives as they see fit, so long as they do not violate others' rights. But a great deal depends on how rights are specified within this liberal formula. My argument is that libertarians define peoples' rights so as to take the view outside the boundaries of a liberal conception. For it is not as if libertarians simply accept all the usual basic rights liberals do, then go liberals one better by adding additional liberties, namely, freedom of contract and freedom to do with one's possessions as one pleases. Liberals already recognize that these rights, suitably construed, are important to exercise other basic liberties. But given the absolute terms in which libertarians define these additional liberties, they come to occupy a predominant position and in effect eliminate any need (in libertarians' minds) for basic rights and for liberal institutions.[40]

39. See Joshua Cohen, "Structure, Choice, and Legitimacy: Locke's Theory of the State," *Philosophy & Public Affairs* 15, no. 4 (1986): 301–24, on Locke's argument against a universal franchise and for a "property owner's state."

40. Here it should be noted that there is much disagreement among libertarianism's major proponents. Nozick argues, contrary to anarchical libertarianism, that a minimal state's monopoly on political power is legitimate and necessary to protect rights and

What are libertarianism's basic formative principles? Libertarians often depict their view as based in a moral injunction against coercion, or aggression, or against forcing people to do what they do not choose to do. (Nozick, for example, emphasizes the "libertarian side constraint that prohibits aggression against another," and Rothbard says his anarchism "abolish[es] the regularized institution of aggressive coercion.")[41] But libertarians do not condemn all coercion or aggression, or hold that no one can be forced to act in ways she has not chosen to. Libertarians clearly endorse the coercive enforcement of personal and property rights and contractual agreements. The need for such enforcement provides the basis for libertarian arguments for a minimal state. Also it is misleading to suggest that the coercion required to enforce the rules of a libertarian society will be less than in other systems. Whether libertarianism requires less (or more) coercion depends upon its popular support and the degree to which members of a libertarian society see its principles as legitimate and accept the many restrictions that they imply.

Libertarians may reply that the enforcement of a person's rights is not coercive interference with others' lives. "Coercion" in their account is not just any use of force but the aggressive interference with another's rights. People are not coerced when prevented from actions (such as trespass or theft) they have no right to perform. This moralized definition of 'coercion' may accord with common usage in some cases, but to extend this manner of speaking to all cases has peculiar consequences. Carried to its limit, the moralized definition of 'coercion' implies that any justified use of force to enforce peoples' rights is non-coercive. Legitimate incarceration would not then be coercive ac-

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entitlements. There are also disagreements over the philosophical foundations of libertarianism (contrast Nozick's Kantian and Lockean foundations with Narveson's Hobbism). I pass over these disputes. My concern is with the basic normative principles and institutions held in common by these views that distinguish them from liberalism. I also recognize that political philosophers cannot always be neatly categorized as liberal or libertarian. Some avowedly classical liberals endorse certain aspects of libertarianism, such as the absence of a social minimum. Even some nonclassical liberals, such as Joel Feinberg, reject inalienability of basic liberties. Whether these mixed views are coherent and have not unreasonable justifications would require separate discussion.

41. Nozick, *ASU*, pp. 33–35; Murray Rothbard, "Society Without a State," in *The Libertarian Reader*, edited by Tibor Machan (Totowa, N.J.: Rowman and Littlefield, 1982), p. 54.

cording to the moralized definition, nor would the use of force to arrest a guilty suspect or to evict an interloper.[42]

The problem with the moralized definition of 'coercion' is that it is stipulated; as such, it does not advance the argument for libertarianism. But even if we accept the libertarian's moralized definition, nothing of real consequence follows from their declarations against coercion and aggression. Any political conception prohibits the unjustified use of force against others, and this is what the libertarian constraint against aggression or coercion really amounts to. It is a prohibition against infringement of peoples' moral rights and entitlements. Arguments regarding the content of these rights and entitlements, then, must carry the burden of justification in libertarian argument, not claims about the prohibition of coercion and aggression.

Nor is the fundamental libertarian principle an injunction that people should be subject only to duties and constraints they have chosen or consented to. The non-consensual constraints on conduct recognized by libertarians are quite extensive. Our duties to respect the lives and the physical integrity of others' persons, and their freedom of action and extensive property claims, our obligations to keep our contracts, avoid fraud, and make reparations for harms we cause, are not based in free choice, consent, or any kind of agreement (actual or hypothetical). These are natural rights and duties, libertarians claim, that people possess independent of social interaction. Despite their emphasis on consent, voluntariness, and contract, libertarians are averse to appeals to consent or social agreement to justify their preferred list of moral rights and duties. Freedom of contract plays a central role in defining the particular rights and obligations that people have *within* a libertarian society, and accounts for the origin of Nozick's minimal state. But the idea of a *social* contract has no role in justifying freedom of individual contract itself or in defining its scope; the same is true of the justification of any of the other moral rights and duties at the basis of libertarians' view.[43]

42. See here G. A. Cohen's discussion of libertarians' moralized concept of freedom in "Capitalism, Freedom, and the Proletariat," *Liberty*, edited by David Miller (New York: Oxford University Press, 1991), chap. 8; also, "The Structure of Proletarian Unfreedom," in Cohen's own *History, Labor, and Freedom* (Oxford: Oxford University Press, 1988), p. 256.

43. This is also true of Jan Narveson's use of David Gauthier's version of contractarianism to argue for libertarianism. Following Gauthier, Narveson appeals to a "Lockean

What of libertarian declarations that "people *interfere* with each other's liberty as *little* as possible" (Narveson, p. 32)? This declaration cannot mean that libertarians seek to minimize the number of interfering *actions*. It is easy to imagine a libertarian society without popular support, where the majority of people do not accept (because they cannot afford to) its absolute property rules, are prone to forage for their subsistence, and meet with constant and regular interference because of legal trespass or theft. The point of libertarian arguments for minimizing interference is to keep to a minimum, not interfering actions, but the kinds of political duties we have, and in particular any enforceable obligations to transfer market-acquired holdings to benefit the disadvantaged. There is still a need for some deeper principle that justifies complete rights to the control and disposal of market distributions regardless of the resulting restrictions this places on peoples' freedom of action or opportunities.

Can it be found in some notion of liberty or freedom? Libertarians commonly announce their view with such claims as, "The only relevant consideration in political matters is individual liberty" (Narveson, p. 7); or "Libertarians agree that liberty should be prized above all other political values" (Machan, p. vii); or "The idea of libertarianism is to maximize individual freedom" (Narveson, p. 175). Nozick, more cautiously, makes no such general claim. But he does contend that "liberty upsets patterns" of distribution (*ASU*, p. 160), and argues as if anyone with a proper regard for liberty should see that patterned theories of distributive justice violate a commitment to freedom.[44]

These announcements account for much of libertarianism's popularity, for few would deny the political importance of individual freedom. But libertarianism does not endorse freedom to any greater degree than does liberalism. Indeed, libertarianism assigns far less importance than does liberalism to freedom as individual independence

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Proviso" to moralize the Hobbesian state-of-nature baseline from which agreement takes place by bestowing a right to liberty and exclusive ownership rights on all involved prior to the social contract (*The Libertarian Idea* [Philadelphia: Temple University Press, 1987], pp. 175–77).

44. See Nozick, *ASU*, pp. 160–64, which contains Nozick's famous Wilt Chamberlain example and the claim that income tax "is on a par with forced labor." See Jonathan Wolff, *Robert Nozick* (Stanford: Stanford University Press, 1991), pp. 83–92, for a valuable discussion.

and autonomy, the degree to which people are self-sufficient and can control their options and important aspects of their lives. Libertarians have a different conception than liberals of the kinds of liberties that are important and of the kinds of constraints to be placed on peoples' conduct to protect others' liberties. It is a fundamental libertarian precept that people ought to have nearly unrestricted liberty to accumulate, control, and transfer *rights in things* (property), whatever the consequences or constraints may be for other people. To refine Nozick's claim—"liberty upsets patterns"—it is not liberty per se or any basic liberty that liberals recognize that upsets patterns of distribution. Rather, what upsets patterns is the unrestricted liberty to accumulate and to transfer to whomever one pleases full property rights. But why should this set of liberties be important, let alone fundamental? To support a claim for its significance, we first need an argument for libertarian property and transfer rights. Some more basic principle still must underlie the right to these absolute liberties.

I have suggested that the concepts libertarians normally appeal to—liberty, consent, noncoercion, nonaggression, noninterference—gain their force and content by reference to a deeper principle. What is this principle? Libertarianism is grounded in a certain conception of people's individual rights; and in particular their property rights, that is, the kinds of rights and powers that individuals may exercise in the possession, use, transfer, and disposal of things. The centrality of the concept of property is evident in Rothbard's and Narveson's views. Both conflate all specific liberties into a general right to liberty. Then they argue that the right to liberty, along with all other rights, are in the end property rights, bolstered by an ultimate right, property in oneself. Narveson says: "Liberty is Property . . . the libertarian thesis is really the thesis that *a right to our persons as our property is the sole fundamental right there is.*"[45] And Rothbard writes:

> In the profoundest sense there *are* no rights but property rights. . . . Each individual, as a natural fact, is the owner of *himself*, the ruler of his own person. Then, "human" rights of the person . . . are, in effect, each man's *property right* in his own being, and from *this*

45. Narveson, *The Libertarian Idea*, p. 66. "The idea of libertarianism is to maximize individual freedom by accounting each person's *person* as that person's own *property*" (p. 175).

property right stems his right to the material goods that he has produced.[46]

Nozick again is more cautious, avoiding such broad generalizations. Still he relies on what he calls the "classical liberal notion of self-ownership" The problem with all nonlibertarian principles of distributive justice, Nozick argues, is that they involve "(partial) property rights in other people" (*ASU*, p. 172; see also 281–83). As for democracy, it too violates the absolute ownership rights each person has in himself, for it is nothing but "ownership of the people, by the people, for the people" (*ASU*, p. 290).

Such claims and arguments as these confirm the suspicion that libertarianism is not so much about liberty as property. Libertarianism's regulative institutional principle is that individuals ought to have absolute rights to accumulate, use, control, and transfer rights in things. To ground these controversial institutions, libertarians extend the concept of property, via the notion of self-ownership, to each person's own person and powers. The fundamental libertarian claim is then that each person is absolute owner of herself, body and powers.[47] Because we each have absolute property in our persons, it is supposed to follow that each has absolute powers over what she owns or acquires consistent with others' ownership rights. On this conception a person's liberties are among the things owned by that person; in this sense, "liberty is property."

G. A. Cohen says "Nozick's political philosophy gains much of its polemical power from the attractive thought . . . that each person is the morally rightful owner of himself."[48] While it may have polemical appeal in contemporary American society, the idea of self-ownership is

46. Murray Rothbard, *Power and Market* (Kansas City: Sheed Andrews and McMeel, 1977), p. 238. See also John Hospers' definition of libertarianism as "the doctrine that each person is the owner of his own life, and that no person is the owner of anyone else's life." "What Libertarianism Is," in *The Libertarian Alternative*, ed. Tibor Machan (n.p: Nelson-Hall, 1974).

47. Others have made similar but more detailed observations about the centrality of property and self-ownership to libertarianism. Most notably, see G. A. Cohen, "Self-Ownership, World-Ownership, and Equality," and other papers in his *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995); see also Jonathan Wolff, *Robert Nozick*, pp. 7ff., and p. 29.

48. See the original version of Cohen's "Self-Ownership, World-Ownership, and Equality," *Justice and Equality Here and Now*, edited by Frank Lucash (Ithaca: Cornell University Press, 1986).

more confusing than attractive. If all that libertarians meant by 'self-ownership' is that each person has certain exclusive rights with respect to her person and her powers, then the claim of self-ownership dissolves into standard liberal accounts of basic rights and liberties: liberty of conscience, freedom of thought, freedom of movement and integrity of the person, freedom to act on a permissible conception of the good, and so on. But libertarians mean more than this; otherwise, they could not extract their most controversial conclusions regarding individual control of resources and their distribution. Whatever more is meant by "self-ownership" and "property in oneself" is crucial at this fundamental stage of libertarian argument.

Libertarians often appear to take "property" to be an intuitively clear notion, involving the nearly unrestricted freedom to control and determine what is done with a thing.[49] But as a legal and moral category, property is more complicated than this. Property presupposes an elaborate system of institutional rules, which specify the kinds of rights, powers, duties, and liabilities persons have with respect to the use, control, transfer, and disposal of things. Systems of property differ depending on how these rules are defined. Actions permitted under one property system (such as full rights to sell or bequeath one's estate) might be prohibited under others.[50] There are conceptually an indefinite number of property systems (although only some of these may be feasible, and far fewer are just.) The concepts of ownership and property rights are definable by reference to this institutional background; these are formal and secondary notions, which are given content relative to one or another system of property rules. To say a person (legally) owns something is to say that this person has certain key rights of use and powers of control within a property system; the family of rights and powers constituting "ownership" often differ from

49. The idea seems to be that because persons have absolute ownership rights in themselves, they acquire absolute property in unowned resources they appropriate, in the products of their labor made from them, and in whatever is exchanged for these products. See Rothbard, *Power and Markets*, p. 1. Nozick again is more nuanced: "People do not conceive of ownership as having a thing, but as possessing rights . . . which are theoretically separable" (*ASU*, p. 281). Still, he assumes that initial appropriation of unowned things bestows plenary property rights.

50. For example, at early common law the "fee entailment" prohibited owners from alienating their estates; landed estates passed by law to the eldest surviving male issue. Entailments were abolished with the predominance of the market system.

one conventionally established property system to another.[51] By extension, moral claims regarding the right to property or rights of ownership commit one to specific claims about the kinds of rights, powers, duties, and liabilities people ought to have with respect to things within a just property system.[52]

If property is seen in this way, it is difficult to understand the familiar but complicated concepts of ownership and property outside of institutional contexts. Libertarians of course deny the institutional conception of property. Fundamental to their arguments are ideas of noncooperative natural property and pre-social ownership. They assume the lucidity of these concepts, and take it as self-evident that property involves unrestricted rights to use and dispose of things. What makes libertarians' notions of self-ownership and property in oneself doubly difficult is that they extend to a person's own capacities a normative relationship normally applied to things. Although one person may, within the legal institution of slavery, legally own another, what does it mean to say a person, legally or morally, owns itself? This is not to deny the conceptual coherence of 'self-ownership'; perhaps several accounts can be given (just as there are several accounts of the reflexive notion of self-consciousness). Locke (for example) used "property in one's own person" to mean that no one is born politically subject to another, but that each has upon reaching maturity rights of self-rule.[53] But I suspect that once we understand what libertarians mean

51. U.S. law rarely utilizes the concept of ownership. The most common concept used is "property interest," of which there are different kinds, each of which is distinguished by various rights and duties.

52. Libertarians and other proponents of self-ownership commonly claim that private ownership of one's person and powers implies ownership of the *product* of one's labors and, hence, ownership of the product of one's property. But the problem is that a person's "product" or "contribution" cannot be established independent of an institutional context. Libertarians usually assume, without much argument, that absolute plenary property rights follow from appropriation in a state of nature. For a fuller statement of the Rawlsian conception of property relied on here see my "Property as an Institutional Convention in Hume's Account of Justice, *Archiv fuer Geschichte der Philosophie* 73, no.1 (1991): 20–49; and "Morals by Appropriation," *Pacific Philosophical Quarterly* 71, no.4 (1990): 279–309.

53. Locke seems to mean, by the archaic sense of "property" in oneself, that each person has certain rights in his own person and is not politically subordinate to anyone else. Locke did not endorse the libertarian idea that persons stand to their person in the same relationship that they stand to property in things. His social contract doctrine

by 'self ownership,' the concept will lose whatever intuitive attraction it has for most people, for what it inevitably implies is something Locke and all subsequent liberals deny, namely that a person has the moral capacity to make of himself a fungible thing.

Why Libertarianism Is Not a Liberal View

The Full Alienability of Basic Rights

I claimed that the most central liberal institution is the protection of the basic rights and liberties needed to secure individual freedom and independence. Libertarians would have us believe that they accept all the basic rights that liberals do and simply add more liberties, namely, absolute freedom of contract and of property. Libertarians then claim their view offers us even greater liberty, as if it they were just improving upon liberalism, drawing its natural conclusion. The problem is these added liberties, when combined with the libertarian account of self-ownership, undermine the idea of basic liberties. For what libertarian self-ownership ultimately means is that we stand toward our person, its capacities, and the rights of moral personality in the same normative relationship as we stand to our rights in things. All rights are conceived as property rights. Rights to liberties then become just one among several kinds of rights that persons own and have at their disposal. Basic liberties are of no greater moral or political significance than any other kind of property right. But given the crucial role of absolute freedom of contract—that all contractual agreements are to be publicly recognized and enforced—it follows that all liberties can be alienated, just like any economic good.

Consequently, there is no place in a libertarian scheme for inalienability, the idea that certain rights are so essential to maintaining the dignity and independence of persons that they cannot be given up by consent. So Nozick says, "My nonpaternalistic position holds that someone may choose (or permit another) to do to himself *anything*, unless he has acquired an obligation to some third party not to do or

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relies on the law of nature that persons do not have the right to alienate or dispose of their person, since all have a duty to maintain themselves exclusively as *God's* property (see *Second Treatise*, sec. 6). On Locke's use of "property" see Simmons, *The Lockean Theory of Rights*, 226 ff.; and Tully, *A Discourse on Property*, p. 116.

allow it."[54] Read within the context of a libertarian acceptance of complete freedom of contract, permitting another to do "anything" to oneself implies the capacity to give another the right to invoke the coercive powers of the state (or anyone else) to force you to comply with your earlier agreements, no matter what you have agreed to or how much you presently object to it. Not surprisingly, then, Nozick later says that a free system allows a person to sell himself into slavery.[55] Assuming the transaction is freely entered into, it is the role of the minimal state to enforce it against the unfortunate person who once consented to enslavement, but who now, quite understandably, has had a change of mind. It should follow that there is nothing morally objectionable about owning slaves and treating people as objects against their will[56]; moreover, it is not unjust for the State, or any third party, to compel people to abide by their slavery or other servitude contracts.

Earlier I argued that it is a mistake to conceive of servitude agreements as simply private matters between consenting adults protected by freedom of association. If genuine freedom of association were involved, then either party could terminate the relationship freely. But here we have something very different: contractual transfers of rights in oneself, the result of which negates a person's freedom of association as well as other basic rights. Contracts by their nature are no longer simply private relationships that leave others' rights and duties unaffected; they become publicly enforceable agreements altering others' rights and obligations. Contracts impose upon others duties to recognize and respect contractual terms, and upon governments duties of coercive enforceability. These facts should not be obscured by the common locution of "private contracts." Libertarians describe *full alienability* of rights as if it were a matter of showing respect for people's freedom and voluntary choices. A better description of a social

54. Nozick, *ASU*, p. 58.

55. Nozick, *ASU*, p. 331; see also p. 283

56. The libertarian may object that it is question-begging to say that enforcement of slave contracts is against purported slaves' will. "After all, they agreed to it! Free informed consent is binding precisely because it expresses (or represents, or even constitutes) the will." I assume that it is against a person's will to coerce her to act in ways she does not want to act. The fact that earlier she committed herself to act as she now is forced to act does not negate the fact that she is now being forced to act against her will.

system that enforces complete or even partial dominion over human beings is that it is a perverse property system. For it is not as if libertarians put a premium upon *maintaining* individuals' freedom of action, much less so their independence, or their capacities to exercise their rights and control significant aspects of their lives. Instead what is fundamentally important for libertarians is maintaining a system of historically generated property rights, whatever the consequences for individuals' freedom, independence, or interests. Libertarianism is, in the end, not so much about liberty as it is about protecting and enforcing absolute property and contract rights. The liberties that libertarians provide are defined by reference to absolute property in persons and in things; who has these rights in the end is not morally important, so long as their holdings come about by observing libertarian transfer procedures and side-constraints.

Libertarians will insist that the distribution of property rights in persons and things still must be generated by rights-owners' free consent. But this does not show that libertarians value each person's freedom any more than giving equal consideration to everyone's (equally intense) desires shows that utilitarians place a fundamental value on equality and maintaining each person's happiness. In both cases we are dealing with a feature of a decision procedure for distributing goods (happiness for utilitarianism, rights for libertarianism) without any check on the distributions this procedure generates. For libertarians, each person starts with ownership of her person and any possessions acquired by transfer. These property rights are deemed of equal significance, and each person is at complete liberty to transfer whatever rights she has. So far as any right is given priority, it is absolute liberty of contract and transfer that determines the procedural mechanism for distributing rights and powers. But no attention is given to maintaining the basic rights, liberties, and powers that (according to liberals) are needed to institutionally define a person's freedom, independence, and status as an equal citizen. So we arrive at the peculiar possibility: the world and all within it can be someone's (or more likely some class's) property, with all but one (person or group) devoid of freedom and independence—and yet all is right and just since libertarian procedures and side-constraints have been satisfied.[57]

57. Nozick's Lockean Proviso (that no one can be made worse off than in a state of

However unlikely, the example emphasizes libertarians' lack of concern with preserving basic rights and liberties, or individual self-governance and independence.[58] This marks an essential difference with liberalism. No liberal regime would enforce or permit enforcement of an agreement against a person who has tried to alienate one or more of her constitutionally protected basic rights. For these are the rights that define a person's status as a free agent, capable of rationally deciding her good and taking responsibility for her actions. Liberalism affirms this ideal of free moral agency, and seeks to secure it via the institutional recognition of basic rights. For rights to be basic means they are not susceptible to being overridden by *anyone's* desires. Being fundamental, basic rights are secured against the (aggregate) wants of others. Being inalienable, they are secured against the wants of those who would dispossess themselves of their basic rights and abandon their freedom and independence.

Libertarians will object that liberals still show "less respect" for liberty, since they refuse to recognize all of a person's free decisions. But no view says all a person's free decisions are to be respected; libertarians, like everyone else, require that free decisions not violate others' rights. The issue between liberalism and libertarianism then becomes whether all permissible liberties are on a par and are equally important, or whether some liberties are more significant than others. Libertarians assign priority to freedom of contract and of property. Liberals give priority to different liberties: liberties crucial to maintaining a person's status as a responsible and independent agent. Given the priority of these liberties, liberals do not recognize decisions to contract away

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nature) would not appear to prevent such an eventuality since its purpose is to put limits on appropriations of unowned things, and not on transfer of original rights in oneself. See *ASU*, pp. 175–82.

58. Libertarians may object that the same can be said of democracy, understood as bare majoritarianism. "Just because democracy *could* result in totalitarianism does not mean that anything is necessarily wrong with democracy." I disagree, for the conceptual possibility shows the moral limitations of majoritarian democracy. Pure majoritarianism—the view that whatever the majority wills is fair, just, or even legitimate—is unreasonable. Majority rule needs to be subsumed within some larger democratic conception of justice to define its scope and restrict the kinds of laws majorities can agree to. For this reason, few people (if any) advocate pure majoritarianism as an adequate account of justice, but people *do* advocate libertarianism as adequate, even though it puts no restrictions on permissible distributions.

all one's liberties or respect the liberty to do so. If this is all libertarians mean when they say liberals give "less respect to liberty," it simply reasserts the main point: liberals deny complete alienability. Liberals can reply that the recognition of rights to alienate freedom is not to respect freedom but to debase it; it makes freedom a fungible thing, tradable for something with a qualitatively different and lesser value.[59]

Absolute Property and Invidious Discrimination

Consider next libertarian attitudes toward liberal institutions affording equal opportunity. Even if narrowly construed, equal opportunity implies more than simply an absence of legal restrictions on entry into preferred social positions by members of salient social classes. Jim Crow laws were not the primary cause of segregation in the South.[60] In many places few laws, if any, explicitly restricted blacks from entry into desirable social positions, from purchasing property in white neighborhoods, from entering private schools and colleges, or from using hospitals, restaurants, hotels, and other private businesses frequented by whites.[61] Still, these events rarely occurred due to tacit (often explicit) agreement among whites. Because of privately imposed restrictive covenants, discriminatory business practices, and blacks' abject economic status, there was little need for laws imposing segregation and discrimination. It could be left up to the invisible hand.

59. Here further consideration needs to be given to the libertarian's insistence (mentioned earlier) that ordinary contractual agreements are binding because they express, or represent, or constitute the will. This provides the main support for their argument that to deny authority to the will by not enforcing alienation contracts undermines the moral basis for enforcing even routine contracts. But if invalidating alienation contracts jeopardizes the authority of routine contracts because it negates the will, then it should also be the case that invalidating contracts to kill third parties or to commit other criminal conspiracies also jeopardizes the authority of more routine contracts. The libertarian will reply that in the case of criminal contracts there is sufficient reason to override the will and freedom of contract (namely, to protect third parties' rights). But then the liberal argument for inalienability says there is likewise sufficient reason to void alienation agreements and not allow their enforcement, namely to protect the status of persons as free and equals. This returns the argument to the real source of disagreement between liberals and libertarians, namely, the basis for individual rights. Thanks to a reviewer for raising this objection on libertarians' behalf.

60. See the seminal work of C. Vann Woodward, *The Strange Career of Jim Crow*, Second revised edition (Oxford: Oxford University Press, 1966), p. 102.

61. See Woodward on each point, ibid., pp. 98, 101, and 99.

Libertarianism has no principles and allows for no laws or institutions that prohibit such invidious discrimination.[62] This is a consequence of the strict priority assigned to absolute property and contract rights. The libertarian conception of property says that people may transfer their holdings to whomever they please, and may allow holdings to be used only by others they choose. Moreover, other than prohibitions against fraud and duress, no legal restrictions can be placed on contractual agreements. It follows that there is nothing unjust about racial, ethnic, gender, or religious discrimination in employment, education, and the provision of goods and services. Libertarians may pay lip service to the classical liberal view of "careers open to talents," but nothing in their doctrine prohibits widespread violation of this idea. Nor do libertarians allow for institutions that prohibit the intentional imposition of racially segregated housing patterns, and the same is true of the sale or provision of all other goods and services. Race, gender, and other forms of discrimination, while they may be uneconomical, unseemly, or imprudent, are still not unjust according to libertarianism. Libertarian property rights then come to provide cover for bigotry and invidious discrimination against what liberals see as the basic interests of citizens.

Markets and Monopolies

Under competitive conditions, markets normally allow for efficient allocations of productive resources and increased output of goods to meet (effective) demand. But if market activities are left unregulated, freely associating individuals can just as well enter agreements designed to restrict others' options, frustrating instead of promoting productive output. The right of unrestricted freedom of contract so central to libertarianism implies that markets are to be wholly self-regulating; government has no role to play in securing market fluidity. There is then no place for laws and institutions designed to promote competition and deter noncompetitive agreements. Absolute contract rights, conjoined with rights of unlimited accumulation that inhere in

62. Narveson is quite open about this: see *The Libertarian Idea*, pp. 313–18. "But if a business is really private, that means it is the property of its owners. They can do as they wish with it" (p. 315).

libertarian property, can then readily lead to cartels or monopolies. That someone may have acquired complete control over some scarce natural resource, such as timber, oil, or water supplies, and charge others whatever he pleases, is wholly consistent with libertarian property rights. Such arrangements are not allocatively efficient. But because libertarians reject any interference with free economic transactions and individuals' complete control over resources, they must place subordinate value on the efficient allocation of productive resources. It is more important to maintain individuals' absolute property and contract rights.[63] In the absence of institutional arrangements enforced by government to prevent excessive accumulation of market power, the likely outcome of libertarian entitlements is a series of contracts establishing a cartel's control in each industry. Once this stage is reached, nothing but goodwill can prevent libertarianism's progression into veritable economic serfdom.

To say that economic efficiency is of subordinate importance to libertarians does not mean that appeals to efficiency have no place in libertarian argument. My claim is that efficiency plays no significant role in establishing the basic principles of the system (i.e., absolute property and contract rights, and the distribution of income and wealth), and that efficiency considerations will be sacrificed to maintain libertarian rights of contract and property. In Nozick's account, efficiency is one of several considerations to take into account in refining property rights and resolving disputes[64]; moreover, a condition of initial appropriation in a state of nature is that others not be made worse off by an initial taking (the Lockean Proviso). But these appeals to efficiency are simply meant to put weak limits on what may be appropriated, and help specify the contours of property rights once appropriated. Once property rights are defined and acquired, there is no requirement that further uses, transfers, and disposals of property

63. See Narveson, for example, who says the idea of monopoly is undefinable in a rigorous way, and that "the use of one's resources for whatever purposes one will is the hallmark of liberal [*sic*] freedom" (*The Libertarian Idea*, p. 203).

64. See for example *ASU*, p. 280, where Nozick suggests that "perhaps the precise contour of the bundle or property rights is shaped by considerations about how externalities may be most efficiently internalized." The idea is at least worth further examination, he says.

be efficient. One may accumulate, use, and dispose of property at will, provided others' rights are not violated and they are not made worse off than they would be *in a state of nature*.[65] By contrast, efficient use (either Pareto or Kaldor-Hicks) is determined by reference to the status quo ante at the time of use, and not by reference to a (real or imagined) state of nature that existed in the distant past. In this regard, efficiency considerations are not fundamental or integral to Nozick's entitlement theory.[66]

The Libertarian Rejection of Public Goods and a Social Minimum

Libertarianism has no place for government to enforce the provision of public goods, those goods not adequately and effectively provided for by markets. The role of the libertarian state exclusively is to protect and maintain rights and entitlements against infringement, to enforce contractual agreements, and to resolve disputes. For governments to tax people to provide public goods is unjustly coercive, as is it for government to tax some and redistribute it to others (for purposes of health care, unemployment, emergency relief, and so on). The state has no role to play in distributing income and wealth (other than enforcing existing rights); distributions are to be decided entirely by people's free decisions. These matters require little discussion here, since libertarians emphasize them as central to their position.[67]

Political Power as a Private Power

Since Locke, liberals have conceived of political power mainly in terms of three primary functions of governments: political power is the authority (1) to legislate public rules and revise them to meet changing

65. See Nozick, *ASU*, pp. 178–82, on the Proviso.

66. Contrast Gauthier's superficially similar argument for natural appropriation, which says that property rights in a state of nature are always revisable in the interests of efficient use. See his *Morals by Agreement*, pp. 293–94. Gauthier's classical liberal account is designed to accommodate considerations of economic efficiency at each crucial point. There is nothing comparable to Gauthier's provisional account of property rights in Nozick's state of nature. For Nozick, individuals acquire absolute property immediately upon appropriation of unheld resources, due to their natural rights and liberties and considerations of individual autonomy and self-ownership.

67. See, for example, Nozick, *ASU*, p. ix.

circumstances, (2) to adjudicate disputes arising under these rules, and (3) to enforce these rules when necessary against those who violate them or who resist adjudicative resolutions. For Locke these three powers are needed to remedy the "defects" of the state of nature.[68] These defects warrant the creation of political society (via a social contract, on Locke's account). This political society (the "Body Politic" or "the People") has the authority to legislate a constitution and place limited political power in a government, which is appointed as the People's fiduciary agent to fulfill these functions on behalf of the People.

One peculiar feature of strict libertarianism is the absence of legislative authority, a public institution with authority to introduce and amend rules and revise social conventions. The need for new or revised rules is to be satisfied through private transactions and the invisible hand, by the eventual convergence of many private choices. Libertarians generally accept that adjudicative and executive powers are necessary to maintain personal and property rights. But these functions are performed by private protection agencies and arbitration services (in Nozick's account, a "dominant protective agency," which is the minimal state). No public body, commonly recognized and accepted as possessing legitimate authority, is required to fairly and effectively fulfill these functions. Political power is privately exercised.[69]

68. See, Locke, *Second Treatise*, sections 124–26 on the three "inconveniences" or "defects" (sec. 131) of the state of nature which give rise to a need for government, and secs. 136–37 on the need for legislative power to publicly specify the Laws of Nature and for an impartial Judge to decide disputes. The three defects are the lack of "an established, settled, known Law," of a "known and indifferent Judge," and of a "Power . . . to give [law and sentences] due Execution." Locke does not advocate separation of powers (in the U.S. sense) but (as under the British Constitution) appears to subsume judicial power under the executive and holds that legislative power is "supreme" (sec. 132). In chap. 13 Locke distinguishes the "Legislative, Executive, and Federative Power of the Commonwealth," the latter being in charge of foreign policy and war and peace (sec. 146).

69. Nozick does recognize the need for a decision mechanism to determine the level of risk that individuals may impose on others. "But the precise mechanism to accomplish this has yet to be described; and it would also have to be shown how such a mechanism would arise in a state of nature." The implication is that such procedure would have to be "reached by the operation of some invisible-hand mechanism" (*ASU*, p. 74). Some may disagree with my claim that libertarianism has no place for legislative authority. But focus again on Nozick's view (which I take as the paradigm). Why couldn't Nozick's minimal state simply create a committee with the task of making rules that decide disputed and indeterminate matters of natural law? Take, for example, the prob-

The libertarian conception of private political power is evident from Nozick's account of the minimal state. Nozick's account is selectively Lockean, for he disregards Locke's duty to protect and maintain humanity and assist others in need and distress.[70] This enables Nozick to contend that it would be irrational for the inhabitants of a Lockean state of nature to overcome the inconveniences of their situation by a social contract.[71] Instead, they enter into separate private contracts with competing protection agencies to enforce their personal and property rights. Eventually, one protection agency achieves a natural monopoly in providing "protection services" for those willing and able to pay for them. (This "dominant protective agency" is the "ultra-minimal state"). Different "packages" of protection services are offered, depending on customer's wants, circumstances, and ability to pay. This dominant protective agency evolves into the minimal state when it provides a minimum level of protection services (the "least expensive protection policy") without charge to those unable to afford them. These services selectively protect nonmembers: They are guarded against the aggression of paying members, but are not shielded from aggressive nonmembers.[72]

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lem of defining riparian rights: The committee could issue a set of rules saying, among other things, that river bed owners have no right to pollute, or to dam water flow, beyond certain limits. Would this decision have the status of legitimate law? Recall that Nozick's minimal state is in effect a joint stock company with a natural monopoly on force. While it may have de facto power to make and enforce rules it does not have any right or authority to do so, nor does it claim any (see *ASU*, pp. 108–10). Any rights or powers the minimal state has must derive from its members. As no person or group has the right to unilaterally issue rules applying to everyone, the same is true of the minimal state. "There is no right the dominant protection agency claims uniquely to possess" (*ASU*, p. 109), including, I assume, the authority to legislate.

70. See section 159 of Locke's *Second Treatise*, where Locke refers to "the Fundamental Law of Nature and Government, viz. That . . . *all* the Members of the Society are to be *preserved*" (referred to also in secs. 6, 16, 18, 134, 135, 183). Because of the fundamental law, each has a duty "to preserve himself" as well as "to preserve the rest of Mankind" (sec. 6). It is consistent with Locke, if not explicitly required, to infer a duty to join political society and recognize public political authority, since governments justified by the social contract are necessary background conditions for the effective exercise of each person's duty to preserve himself and all of mankind.

71. "Anything an individual can gain through such an unanimous agreement he can gain through separate bilateral agreements" (*ASU*, p. 90).

72. Protection services against members are provided to nonmembers without charge in compensation for requiring them to resolve disputes with the agency's paying

So conceived, the libertarian state originates in and is sustained by a network of private contracts.[73] This network of agreements continues into the present, and is needed to maintain the minimal state. Clients of the minimal state must purchase their protection "policies," just as they purchase auto or medical insurance. They contract for different services depending on their willingness and ability to pay; if they cannot pay, then they receive minimal protection against the minimal state's clients. They do not receive protection from the aggression of its nonclients (others equally unable to afford protection services.)

How are we to assess this conception of political power? How does it compare with liberalism? Begin with the minimal state's lack of legislative authority. H.L.A. Hart has argued that any society is bound to be static and primitive if it entirely relies on custom and people's uncoordinated responses to new situations, and is without a commonly recognized and accepted procedure that identifies rights and duties and that issues public rules to promptly respond to changing conditions.[74] One challenge to libertarianism is to show that this is not its inevitable fate. No matter how knowledgeable and informative the Invisible Hand, libertarian agents are invariably going to be unsure of and will disagree about the application of their abstract rights and duties. The

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clients within the agency's arbitration procedures, thereby losing their rights of private enforcement of their rights. See *ASU*, chaps. 2 and 5, especially pp. 101–19.

73. This claim and the ensuing argument in this section—that libertarianism resembles feudalism—applies to the minimal libertarian state, and to the competing protection agencies envisioned by anarchical libertarianism. Though Nozick says the minimal state is "the only morally legitimate state" (*ASU*, p. 333) and that "any state more extensive violates people's rights" (*ASU*, p. 149) he still leaves open the theoretical possibility that a "more extensive state" could arise legitimately out of the minimal state, so long as it is unanimously agreed to. Nozick has a long discussion of how (something purportedly resembling) democracy might arise out of a minimal state. His account of democracy is a caricature, since it involves everyone making themselves slaves to one another. He says this "tale" of how a more extensive state might arise is "designed to make such a state quite unattractive" (*ASU*, p. xii). In any case, as he says, "it is highly unlikely that in a society containing many persons" that a more-than-minimal-state could survive, precisely because unanimous consent is required. In light of these remarks, I see Nozick as contending that the minimal state, even if it may not be the only conceptually possible legitimate state, is nonetheless the only realistically possible legitimate state. This would explain his explicit statement that it is "the only morally legitimate state." I am grateful to a reviewer for this journal for calling this feature of Nozick's view to my attention.

74. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), pp. 89–96.

absence of a public institution that refines libertarian principles and authoritatively issues public rules to apply to historical conditions and specific circumstances will result in (as Locke says) great "inconvenience." Without institutions to publicly identify the principles of libertarian natural law and to specify their rules under existing circumstances, it is difficult to see how the countless sophisticated rules that make up the modern institutions of property, contract, securities, negotiable instruments, patents and copyrights, and so on, could effectively evolve simply by the Invisible Hand. Even if these institutions were to evolve without legislative power, once in place no legal person possesses the authority to revise rules to meet changing conditions, eliminating ineffective rules and introducing new ones in their stead. No institution exists for changing norms to adapt to new circumstances except for the gradual process through which all libertarian rules and institutions evolve.

Political power is then truncated under libertarianism since there is no commonly recognized legislative authority. Moreover, the judicial and enforcement powers that do exist remain in private hands. One of the most characteristic features of libertarianism is that the protection and enforcement of people's rights is treated as an economic good, to be provided for by private market interactions.[75] Initially held by each individual, these private political powers are transferred by each through separate contractual agreements to other private persons who compete on the market to provide protection, arbitration, and enforcement services. Different arrangements are made depending on the political services people want and can afford. In Nozick's version a single dominant protection agency eventually acquires a de facto monopoly in political power; its competitors go out of business. In Rothbard's and other anarchical versions no such monopoly need exist; presumably competing protection agencies can peaceably coexist. In both accounts political power is privately exercised for the benefit of those who can afford it and according to whatever favorable terms each person can bargain for.[76] The distribution of political "services" depends then on a person's wealth and relative bargaining position.

75. See Nozick, *ASU*, p. 24: "Protection and enforcement of people's rights is treated as an economic good to be provided by the market, as are other important goods such as food and clothing."

76. It remains true on Nozick's account that political power is exercised mainly for

Is this a just and feasible arrangement? Libertarians place in private hands the role of identifying, interpreting, and coercively enforcing the conditions of social cooperation, including the most basic claims for restraint, protection, and assistance that are a condition of social life. Political power is privately exercised and is distributed like any other private economic good. Recall the features of public political authority as conceived by liberals, discussed in section I: (1) its non-personal, institutional nature, (2) its institutional continuity: political power is maintained over time by generally accepted rules of succession, (3) political power is recognized as authoritatively held and as legitimate, (4) because of its fiduciary nature, political power is to be exercised in trust for the benefit of those represented, and (5) the impartiality of political power: it is to be exercised equitably for the public good, and for the good of each citizen or subject.

Can libertarianism meet these liberal conditions on public political authority? Assume, for purposes of argument that libertarianism can satisfy (1) and (2). We can imagine the libertarian state as a kind of corporate body (not simply the power of an individual or family) with settled procedures; it exists continuously due to its corporate rules for selecting and replacing officers, and it survives individuals' retirement or demise.[77] Does this institution meet the remaining conditions for public political power? Beginning with condition (3), does the libertarian minimal state enjoy political legitimacy?

Libertarian political power is based in private bilateral contractual agreements. So far as there is a monopoly on coercive power, it is a natural, not a de jure monopoly.[78] Indeed, it is essential to libertarian

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the benefit of those who pay for it even when nonclients are provided protection services against clients' aggression. The protection agency provides nonclients with these minimal services only to compensate them for being prevented from apprehending and punishing clients for alleged wrongs. Providing nonclients minimal services is just one of the costs incurred in providing protection services for paying clients. See Nozick, *ASU*, pp. 110–13.

77. Strictly speaking, corporations are products of public law, existing by virtue of statutes that prescribe their conditions and governing procedures. The minimal state can at most be a nonlegal institution, resembling a corporation but without legal or constitutional sanction or authority.

78. See Nozick, *ASU*, pp. 108–10. The phrases "monopoly on coercive power" or "monopoly on force" (whether de jure or de facto) does not mean that no one but the state actually exercises such power—obviously violent criminals do, as do people acting in

political power that it not claim a de jure monopoly on political power or any *right* to political rule. So the effectiveness of libertarian political power is made to depend on its de facto exercise against persons who have not consented to its exercise against them (which is true even of clients of Nozick's dominant protection agency.) What exists to maintain the effectiveness and stability of libertarian political power other than its *de facto* monopoly? Do people have reason to respect this power, or do they comply with its judgments, orders, and decrees simply out of fear? If political power is based simply in a natural monopoly, then in what sense can it be seen as the exercise of political *authority* as opposed to simply the employment of brute force? That some private body monopolizes political power is no reason to respect it (although it might be reason to fear it). There is then likely to be no general recognition of the moral or legal authority of the private state in libertarian society. But without the public's sense of its authority, libertarian political power lacks one of the most effective means for enforcing rules and judicial judgments, namely, the sense of allegiance and political obligation to authority. Moreover, the exercise of effective judicial power depends on such concepts as *jurisdiction* over parties and particular grievances and disputes, as well as the *validity* of judicial judgments based in an authorized body of laws. The mere exercising of judicial powers and making and enforcing judgments would seem to be insufficient to give rise to these normative concepts.[79]

These three attributes—recognition of a government's rightful *authority* to rule (accompanied by a corresponding sense of allegiance and political obligation), governments' *jurisdiction* over persons and disputes, and issuing *valid and binding legal judgments*—are central features of governments as enduring political and legal systems. They are all part of the idea of *political legitimacy*. It is doubtful whether the de facto monopoly on force possessed by the libertarian minimal state can ever give rise to political legitimacy in this sense (and even more doubtful that the competing protection agencies that anarchical libertarians defend can achieve it). This raises questions regarding libertarianism's feasibility and stability. It also implies questions of justice,

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self-defense—but that anyone exercising force must answer to the state-as-monopoly-holder, and show that the exercise is justified or excused.

79. See again Hart, *The Concept of Law*, pp. 94–96.

for what gives political power its legitimacy ultimately is its fiduciary nature, its impartial exercise, and its primary objective, the common good.[80]

What then of the fiduciary nature (4) of libertarian political power? Libertarian political power is exercised pursuant to the terms of economic contract: it is individually bargained for, sold for a profit at the going market (or monopoly) rate, and is normally distributed only to those who pay for it.[81] Economic contractual relations normally are driven by private interest; parties are indifferent about the good of one another and negotiations are conducted at arms length. Economic contractual relations are not fiduciary relations, which by their nature require acting for another parties' interests even at the expense of one's own. Moreover, a peculiar feature of the minimal state, and of competing protection agencies under anarchical libertarianism, is that political power becomes a sort of (private) corporate power. As a for-profit enterprise, the protection agency's primary duties extend to its owners or shareholders. While the manager-shareholder relationship may be conceived as fiduciary (as a matter of public law), this is very different from the fiduciary capacity of governments, in which the beneficiaries of political authority are supposed to be those who are governed.

Here a libertarian might reply, "Its basis in private contract does not by itself make libertarian political power nonfiduciary, for lawyers and bank trustees are deemed fiduciaries. This is just the product they have to sell: they contract out their services (as guardians, trustees, agents, etc.) to represent and act in the interests of their clients." But they do so within the structured setting of a system of public laws and

80. It may be objected here that libertarians such as Nozick already have an account of political legitimacy that I simply ignore: that is, the dominant protection agency is politically legitimate insofar as it has a larger (or monopoly) share of the jointly held right to punish (and therewith interpret and enforce natural law) than any competing agency. But Nozick is explicit that the dominant protection agency does not enjoy a de jure monopoly; it simply exercises a de facto monopoly (*ASU*, pp. 108–10). (Indeed, it is crucial to Nozick's response to the anarchist that the minimal state not claim a de jure monopoly.) Also, Nozick nowhere says that the dominant protection agency possesses political legitimacy (which is different from moral legitimacy, which he does claim exclusively for the minimal state) (*ASU*, p. 332). Political legitimacy does not seem to be a concept that Nozick employs or even sees as significant.

81. The exception, again, is the minimal protection services provided nonclients against client's aggression in Nozick's minimal state. See notes 72 and 76.

political institutions, which regulates their contracts to be fiduciaries and prescribes specific duties upon them above and beyond those specifically contracted for. Lawyers would not be allowed to reach agreements with their clients that relieve them of the fiduciary duties imposed on them by law. Moreover, lawyers are deemed to act as "officers of the courts": they stand in a fiduciary relationship not just to their clients but to the public as well, and cannot pursue their own or their clients' interests contrary to the public interest (as conventionally defined). Lawyers are sanctioned when they breach these responsibilities. Within libertarianism, however, no structure of publicly recognized principles and institutions imposes general duties on protection agencies to act in a fiduciary capacity for their members' interests or for the public interest. In so far as it is exercised for benefit of another, libertarian political power is guided only by the obligations fixed by many bilateral contractual bargains.[82]

Consider finally condition (5)—political power is to be exercised impartially and for the public good—and the sense in which libertarian political power is most conspicuously nonpublic. (a) Libertarian political services are not uniformly supplied, but are provided in proportion to a person's willingness and ability to pay. People receive only those protection, arbitration, and procedural rights they can afford to pay for. Political power is not then *impartially* administered. This holds true even for Nozick, who (unlike other libertarians) provides minimal protection benefits to nonmembers without charge: The level of protection provided is not equal to others (e.g., no arbitration services are provided); moreover, minimal protection is not provided against the

82. I do not mean to say that the private libertarian state does not act *at all* for the interests of its clients. If it did not then no one would buy its services. The point rather is that it does not act as a fiduciary but only performs those services that are specifically contracted for by each individual, and when there is a dispute about services to be provided, it is resolved by considerations of the "bottom line." A good analogy is patients' relations with for-profit HMO's. Even in a competitive climate, for-profit HMO's provide only enough services to keep a client's services, and only then if it pays to do so. (So they seek to clear the rolls of people who require a lot of medical treatment.) Imagine now that a for-profit HMO has acquired a monopoly over medical services, and does not need to fear the entry of a competing HMO into the market (e.g., it has made exclusive employment contracts with all the local physicians). Knowing how for-profit HMO's operate even under competitive conditions, it is not hard to imagine how the monopoly HMO will respond to claims for services in the event of inevitable contractual ambiguities. In this regard (and others) the minimal state, like the monopoly HMO, does not act in a fiduciary capacity for the interests of its clients.

people most likely to attack nonmembers, namely, other nonmembers. (b) Further, in acting from private (corporate) motives and for the private benefit of its paying customers (and its stockholders), there is no objective or understanding that the minimal state acts for *public benefit*, for the good of society and all of its members. As it eschews public goods in the economic sense, libertarianism eschews the public good in the moral sense. Political power is not exercised for the sake of justice (even as libertarians define it), but for private ends.

What is striking about libertarians' conception of political power is its resemblance to feudalism. By "feudalism" I mean a particular conception of *political* power, not the manorial system or the economic system that relies on the institution of serfdom (as in European medieval feudalism).[83] Feudalism is a system of personal political depen-

83. As G. G. Coulton notes, feudalism "is proverbially difficult to define" (*Medieval Panorama* [Cambridge: Cambridge University Press, 1955], p. 45). For my purposes "feudalism" is construed as a conception of political power exercised as a private prerogative, and is grounded in a network of private agreements. Neither Aquinas (who saw politics as ideally grounded in a conception of the common good) nor any of the Scholastics endorsed feudalism in this sense; they endorsed a limited monarchy subject to clerical power in matters affecting religion (see *St. Thomas Aquinas: On Politics and Ethics*, edited by Paul Sigmund [New York: Norton, 1988], pp. xxii–xxiii). Feudalism and kingship are then different and opposed systems. Feudalism historically arose out of the breakup of the monarchical system in both Japan and in Europe (after A.D. 800, the end of Charlemagne's reign). Under feudalism "in its most developed form—that is in eleventh century France—the national system has become obliterated" (Coulton, p. 49). "Political authority and private property were merged together into the new feudal relation" (Christopher Dawson, *The Making of Europe*, [New York: Meridian, 1956], p. 227). Around 1100 monarchy began reasserting its powers in the Franken lands where feudalism was most prevalent. Feudalism and monarchism gradually melded into one system as monarchies slowly regained political power, and feudal lords still retained a good deal of their private political power. It is during this syncretic period (not during the high era of feudalism from ca. 850–1100) that so-called "feudal law" appears, regulating among other things contractual relations between lieges and lords.

I emphasize that feudalism is intended here as a doctrine about *political* power. It does not imply serfdom or the manorial system. Feudalism in Japan had nothing resembling the serfdom of European feudalism. Much less so should feudalism be identified with serfdom, for serfdom also occurred in non-feudal societies whose political basis lay not in contract but in ties of kinship (see Peter Duus, *Feudalism in Japan* [New York: Alfred A. Knopf, 1969], pp. 9, 15–16, 77). The tradition that identifies feudalism with serfdom and the manorial economy stems from Marx's use of "feudalism," and receives its classic expression in Marc Bloch, *Feudal Society* (Chicago: University of Chicago Press, 1964). If feudalism is understood in Marx's sense, then of course libertarianism differs from Medieval feudalism since libertarianism rejects hereditary serfdom.

Finally, I use "feudalism" to denote an idealized *conception* of political power. It may be that no historically existing political arrangement ever fully satisfied all the features of

dence that is based in a network of private contractual agreements. Under feudalism, the elements of political authority are powers that are held personally by individuals, not by enduring political institutions. These powers are held as a matter of private contractual right. Individuals gradually acquire the power to make, apply, and enforce rules by forging a series of private contracts with particular individuals or families. Oaths of fealty or service are sworn in exchange for similar or compensating benefits. Those who exercise political power wield it on behalf of others pursuant to their private contractual relation and only so long as their contract is in force. Since different services are provided to people, there is no notion of a uniform public law that is to be impartially applied to all individuals. Instead, "custom and verbal agreement take the place of written law."[84] Moreover, subjects' political obligations and allegiances are voluntary and personal: They arise out of private contractual obligations and are owed to particular persons. Political obligation and allegiance are not seen as moral imperatives based either in a duty of justice or in duties to humanity or to members of any national or ethnic group.[85]

Of course, under feudalism proper in Europe, personal loyalty between liege and vassal was seen as a moral duty arising out of contract. Loyalty was an important political motivation, and a complicated system of loyalty-norms cemented personal allegiances. Loyalty motives and norms are of course absent from libertarianism; it relies on self-interest and the obligation to keep one's contracts as sufficient incentives to keep one's political obligations (to provide protection services, for example). But in all other respects mentioned, libertarianism resembles feudalism. This resemblance stems from both doctrines' con-

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the conception set forth in the text. (For example, even in what is now France where feudalism was most prevalent, there was at least lip-service paid to the monarchy.) But in this sense, feudalism does not differ from liberalism or libertarianism as idealized political conceptions.

For helpful discussions of the history of feudalism in Europe and Japan, see Coulton, *Medieval Panorama*, pp. 45–56; the books by Duus and Bloch cited above; Norbert Elias, *Power and Civility* (Oxford: Basil Blackwell, 1982), pp. 57–66; and Jean Pierre Poly and Eric Bournazel, *The Feudal Transformation: 900–1200* (New York: Holmes & Meier, 1991).

84. Coulton, *Medieval Panorama*, p. 47.

85. See Duus, *Feudalism in Japan*, pp. 73, 94. Contrast nationalism, where political loyalty is nonvoluntary, nonpersonal in that it extends to the nation-state, and based in a noncontractual duty of allegiance.

ception of political power as a system of personal political dependence grounded in a network of private contractual relations. Like the provision of any other individual service, contracting for protection and arbitration services is simply the way people defend themselves and secure their interests from others' aggression.[86]

Liberalism evolved in great part by rejecting the idea of privately exercised political power, whether it stemmed from a network of private contracts under feudalism or whether it was conceived as owned and exercised by divine right under royal absolutism.[87] Libertarianism resembles feudalism in that it establishes political power in a web of bilateral individual contracts. Consequently, it has no conception of legitimate public political authority nor any place for political society, a "body politic" that political authority represents in a fiduciary capacity. Having no conception of public political authority, libertarians have no place for the impartial administration of justice. People's rights are selectively protected only to the extent they can afford protection and depending on which services they pay for.[88] Having no conception of a political society, libertarians have no conception of the common good, those basic interests of each individual that according to liberals are to be maintained for the sake of justice by the impartial exercise of public political power.[89]

86. See Elias, *Power and Civility*, pp. 57–65 on feudalism. Note here that the coronation oaths establishing relations between feudal lords and their vassals were explicitly referred to as "compacts." Moreover, the term "feudalism" derives from the Latin *foedus*, which according to one interpretation means "a contract, covenant, agreement between individuals." See *Cassell's New Latin Dictionary* (New York: Funk & Wagnalls, 1969), p. 252, under "foedus." See also Poly and Bournazel, *The Feudal Transformation: 900–1200*, chapter 2, on the feudal contract.

87. Divine right absolutism and feudalism differ of course in that the former recognized institutionally unconstrained political power, whereas under feudalism (as under libertarianism) political power extends no further than what is contracted for. Pure feudalism in effect recognizes no state, just a network of private contractual relations. In Europe, absolutism was a reaction to the quasi-anarchy brought about by feudalism, but absolutism retained feudalism's idea of political power as something privately held (no longer based in contract but now purportedly in divine right.)

88. Even in Nozick's account, where nonclients are minimally protected for "free" from clients' (but not other nonclients') aggression, they are still selectively, not impartially, protected.

89. Why couldn't Nozick's minimal libertarian state govern for the common good, understood as protecting people's libertarian rights? Since the minimal state is just a private for-profit business, which happens to have a *de facto* monopoly on power, it

Concluding Remarks

My purpose has been to show that the primary institutions endorsed by the liberal political tradition are incompatible with libertarianism. I have assumed that liberal institutions can have different philosophical justifications and can be accepted from different points of view. This is to be expected given the reasonable pluralism (as Rawls calls it) that will exist in a well-ordered liberal society. Libertarianism will no doubt be advocated by some in any liberal society, but they will not endorse basic liberal institutions. Whether libertarianism will gain sufficient adherents to undermine a well-ordered liberal society is a question of the stability of liberal institutions. No matter how coherent its justification, classical liberal institutions may be prone to disintegrate into libertarianism. Instability would most likely result from the extensive significance that classical liberalism assigns to private property and the desirability of market distributions. If people are led to believe in the inherent justice of market distributions and the "sanctity" of private property as defined by existing law, then regardless of classical liberalism's theoretical justification (overall utility, market efficiency, a Lockean argument, or the Hobbism of Gauthier and Buchanan), citizens will likely come to believe that they have a fundamental moral right to whatever they acquire by market exchange, gift, and bequest. If so, then liberal institutions will periodically be jeopardized. Those better off will resent taxation to pay for public goods, social security and health care for the elderly and handicapped, and minimum income supports and other assistance for the poor. Moreover, democratic gov-

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cannot be said that it governs with any *intention* of promoting and maintaining a common good. It may be that the common good, understood as protecting libertarian rights, in fact is promoted (as a kind of positive externality) by minimal state action; but this does not really differ from the way in which any private firm, in seeking private benefit, incidentally promotes a common good. So if the libertarian state promotes the common good, it does so in the same way as does Microsoft, General Electric, or Pinkerton Private Security Services. I assume, however, that the idea of the common good has more structure than this in liberal political thought. It is an operative idea in liberal theory, not an incidental side effect, and government is instituted and designed with the intention of securing the common good. Securing the common good, even if understood in libertarian terms, is not an aim of the libertarian minimal state, as argued in the text. (For Nozick's explicit rejection of the idea of the social good, see *ASU*, pp. 32–33.)

ernment's very legitimacy may be questioned. These are familiar and recurring events in U.S. history.[90]

Among nations, the United States is distinctive in that it celebrates as part of its national consciousness the Lockean model (some would say "myth") of creation of political society by original agreement among free (and freeholding) persons, all equally endowed with certain natural rights. Modify this national story slightly (mainly by substituting a web of bilateral contracts for the social contract, and eliminating the duties it entails) and we have the essential makings of libertarianism. Perhaps this explains why libertarianism is such a popular and peculiarly American view. However slight these modifications may seem, their effects are far reaching, for what we have in libertarianism is no longer liberalism, but its undoing.

90. High liberalism should not be prone to the same instability, for it distinguishes personal property that is part of or essential to basic liberty from economic rights to control means of production, and construes the freedoms implicit in the latter rights in terms of what is needed to secure each person's individual independence. See John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), pp. 114–15, 177. This complicated topic warrants further discussion since it goes to the main difference between the classical and high liberal traditions.